

Feliciano (Migration) [2024] AATA 1009 (28 March 2024)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Dexter Feliciano

REPRESENTATIVE: Mr Alan Geoffrey Smith (MARN: 1789853)

CASE NUMBER: 2213020

HOME AFFAIRS REFERENCE(S): BCC2021/1026030

MEMBER: George Hallwood

DATE: 28 March 2024

PLACE OF DECISION: Adelaide

DECISION: The Tribunal remits the application for a GK – Temporary Skill Shortage (Class GK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 482 - Temporary Skill Shortage visa:

Public Interest Criterion 4020 for the purposes of cl 482.217 of Schedule 2 to the Regulations

Statement made on 28 March 2024 at 4:48pm

CATCHWORDS

MIGRATION – Temporary Skill Shortage (Class GK) visa – Subclass 482 (Temporary Skill Shortage) – false or misleading information – employment history – waiver of requirement – compelling circumstances affecting the interests of Australia – specialist skills – technical concrete repair – decision under review remitted

3.

LEGISLATION

Migration Act 1958 (Cth), s 65
Migration Regulations 1994 (Cth), Schedule 2, cl 482.217; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 15 August 2022 to refuse to grant the applicant a GK – Temporary Skill Shortage (Class GK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicant applied for the visa on 4 May 2021. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 482.217 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate found there is evidence before the Minister that the applicant has provided, or caused to be provided, a bogus document or false or misleading information in relation to this visa application.
6. The applicant appeared before the Tribunal on 12 December 2023 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Ellen Brown, a representative of the applicant's employer, Maxcim.
7. The applicant was represented in relation to the review.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 482.217 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
14. On the application form for the subclass 482 visa lodged on 4 May 2021 the applicant stated that he was employed as a blaster / painter at Mapol Construction and Services in the United Arab Emirates (UAE) from 15 October 2008 to 15 December 2013. In a CV provided to the Department the applicant claimed to have been employed as a blaster / painter at Mapol Construction and Services in the Philippines from October 2008 to December 2013.
15. In a letter dated 22 November 2023 the applicant stated:
 16. *I am writing to express my sincerest apologies for giving false/ misleading information on my 482 visa application. What happened is I provide a cv and the claim that I worked as a blaster and painter in the philippines from October 2008 to December 2013 is not true and I am really very sorry for what I've done lied in this claim.*
17. In a student visa application lodged on 9 March 2019 the applicant had stated that he was employed as a Designer Visual Display from October 2010 to November 2013 in Saudi Arabia. This employment was also included in a protection visa application lodged on 26 November 2019.
18. At the hearing the applicant told the Tribunal that he had been working as a Designer Visual Display from October 2010 to November 2013 in Saudi Arabia, and not as a blaster / painter at Mapol Construction and Services in the Philippines or in UAE. He also told the Tribunal that he had only worked as a blaster / painter after he started working for Maxcim. Mr Feliciano told the Tribunal that he had given false or misleading information. For these reasons, the Tribunal is satisfied that the applicant gave, or caused to be given, false or misleading information.
19. Applicants for the subclass 482 visa must have the skills, qualifications and employment background that the Minister considers necessary to perform the tasks of the nominated occupation: cl 482.212. Therefore, the false or misleading information given by the applicant is relevant to criteria the Minister may consider when making a decision on the application.

20. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

21. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
22. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others. Whether compelling or compassionate circumstances exists is a question of fact and weight, based on the evidence and information before the decision maker.
23. For the following reasons, the Tribunal is satisfied that the requirements should be waived.
24. *Compelling circumstances affecting the interests of Australia*
25. While not binding on the Tribunal, in the interests of consistency in application of legislation the Tribunal will generally consider relevant departmental policy. In terms of compelling circumstances affecting the interests of Australia the department's policy at 6.10.3.1 provides some examples of what may demonstrate and what may not demonstrate these circumstances:

There may be compelling circumstances affecting the interests of Australia if:

- Australia's trade or business opportunities would be adversely affected were the person not granted the visa (Note: under policy, gaining employer sponsorship is not considered sufficient grounds for a waiver)
- Australia's relationship with a foreign government would be damaged if the person is not granted the visa or
- Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa.

It is departmental policy that compelling circumstances affecting the interests of Australia would not include circumstances where the applicant merely claims that, if granted the visa, they would:

- work and pay taxes in Australia,
- pay fees to an education provider; or
- spend money in Australia.

26. At the hearing the applicant put to the Tribunal that he is a hard worker with specialist skills. The Tribunal was told that his work involves technical concrete repair requiring high quality standards to be met. The Tribunal accepts this evidence. The applicant said the projects he had been working on affected significant number s of Australians and included: the Sydney overseas passenger terminal; the Circular Quay station bridge; the water treatment plant at

St Mary's; the gold mine in Orange; the Shell Harbour water treatment plant; Bateman's Bay water treatment plant; and a sewerage pumping station on the Central Coast.

27. A letter of support dated 4 January 2024 from Mr Adrian Willingham, Managing Director of Willcen Pty Ltd, states that the applicant is a person his business engages for months at a time from Maxcim, the applicant's employer, for highly specialised plastic welding work. Mr Willingham states that the applicant's absence would create a significant loss of capability for both Maxcim and Willcen Pty Ltd.
28. A letter of support dated 4 January 2024 from Mr John Colautti, Director of Maxcim Pty Ltd provides a list of projects worked on by the applicant corroborating evidence of the broad importance of the projects on which the applicant works. A support letter from Mr John Colautti dated 23 November 2023 states that the applicant *"has now reached the level of 'leading hand' and is able to lead and manage a team with minimal input from his superiors"*.
29. Mr Francesco Meneghel gave oral evidence to the Tribunal describing the complex technical nature of the work performed by the applicant, blasting and painting performing remedial work on steel and concrete, and, describing that it is extremely difficult to recruit people that hold these skills.
30. Compassionate or compelling circumstances exist that affect the interests of an Australian citizen, Australian permanent resident or eligible New Zealand citizen are also discussed in the department's policy. The policy notes that the interests of the applicant are not relevant when considering whether a waiver should apply.
31. The applicant told the Tribunal of a work colleague who has a wife and daughter, both Australian citizens, that suffer from depression that the applicant helps. After the hearing Letters were received corroborating the assistance provided by the applicant. No medical evidence was provided in relation to their condition. The Tribunal is satisfied that the applicant is assisting his friend's family and that they are Australian citizens.
32. The Tribunal is satisfied that the applicant provided information that is false or misleading in a material particular in relation to the application for the visa on more than one occasion. This is a serious breach of a criterion that is very important to the protection of Australians and others.
33. The Tribunal has carefully considered the facts in this case and is satisfied on the basis of compelling circumstances affecting the interests of Australia that, for the reasons above, the evidence weighs slightly in favour of justifying the granting of the visa. Having regard to those circumstances the requirements should be waived.
34. Therefore the requirements of PIC 4020(1) should be waived.

Has the applicant satisfied the identity requirements?

35. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity.
36. The applicant told the Tribunal, and there is nothing on the file that conflicts with the applicant's statement, that his identity has not been in question. The applicant's appearance is a good match for his photographic ID on file.
37. Therefore, the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

38. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
39. The applicant told the Tribunal that neither he nor any member of his family unit have previously been refused a visa on the basis of a failure to satisfy PIC 4020(2A). There is nothing on file to refute that.
40. Therefore PIC 4020(2B) is met.

41. Concluding paragraphs

42. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl 482.217.

DECISION

43. The Tribunal remits the application for a GK – Temporary Skill Shortage (Class GK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 482 - Temporary Skill Shortage visa:
- Public Interest Criterion 4020 for the purposes of cl 482.217 of Schedule 2 to the Regulations

George Hallwood
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...